

In the Matter of:)
)
PUBLIC HEARING ON PROPOSED)
AMENDMENTS TO THE FEDERAL)
RULES OF CIVIL PROCEDURE)
)

Place: Washington, D.C.

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TRANSCRIPT OF PROCEEDINGS

Date: January 22, 2021

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BEFORE THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS

In the Matter of:)
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PUBLIC HEARING ON PROPOSED)
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RULES OF CIVIL PROCEDURE)
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Corporation

Remote Hearing
Suite 206
Heritage Reporting

1220 L Street, N.W.
Washington, D.C.

Friday,
January 22, 2021

The parties met remotely, pursuant to notice, at
1:02 p.m.

BEFORE: HONORABLE ROBERT M. DOW, JR.
Chair to the Advisory Committee

ATTENDEES: (Via Videoconference)

HON. JENNIFER C. BOAL
HON. JOAN N. ERICKSEN
HON. KENT A. JORDAN
HON. SARA LIOI
HON. BRIAN MORRIS
HON. ROBIN L. ROSENBERG
HON. DAVID C. GODBEY
HON. CATHERINE P. McEWEN
HON. JOHN D. BATES
JOSEPH M. SELLERS, Esquire
ARIANA J. TADLER, Esquire
HELEN E. WITT, Esquire
DAVID J. BURMAN, Esquire
JOSHUA E. GARDNER, Esquire
PETER D. KEISLER, Esquire

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ATTENDEES: (Cont'd.)

PROF. EDWARD H. COOPER
PROF. RICHARD L. MARCUS
DEAN A. BENJAMIN SPENCER
SUSAN Y. SOONG, Esquire
JULIE M. WILSON, Esquire
KEVIN CREENY, Esquire
BRITTANY BUNTING

Speakers:

STACY BRAVERMAN CLOYD, National Organization
Of Social Security Claimants' Representatives

JOANNA SUYES, Marks & Harrison

P R O C E E D I N G S

(1:02 p.m.)

JUDGE DOW: So good afternoon for most of us. Professor Marcus and those of you on the West Coast, good morning still. I want to welcome everybody to this video hearing today, and this is on the Proposed Amendments to the Federal Rules of Civil Procedure relating to the supplemental rules for Social Security review actions under 42 U.S.C. § 405(g).

I know we have a number of participants here from outside the Rules Committees, so I want to welcome you all. I do want to thank everybody for the written comments that we've received as well, and in a few minutes, we'll hear from our two witnesses who have been asked to testify at today's public hearing.

Before we start, though, with that, I do want to thank especially our colleagues at the Rules Office at the AO for setting this up. I know Brittany has been running lots of polls to make sure we could find a date and a time that worked for everybody, and I really appreciate all the excellent work that she

1 has done and certainly Rebecca Womeldorf and Julie
2 Wilson and everybody else at the Rules Office.

3 We received all of the public -- all the
4 written comments in one nice PDF, and this hearing has
5 been organized, really, with them taking the laboring
6 oar, so I really appreciate it. I do look forward to
7 the day when we can have public hearings in person, as
8 we're all accustomed to, but given that we can't do
9 that right now, this is an awfully good way of getting
10 together. And I'm really grateful to everybody at the
11 AO, and a special shout-out to Brittany for being our
12 coordinator-in-chief for today. So I thank you.

13 I also want to thank the subcommittee for
14 all of their hard work in getting us to this day. The
15 Subcommittee Chair, Judge Sara Lioi, has run many,
16 many meetings to get us to this point today. And all
17 of the subcommittee members, I hope they're all
18 available to make it today: Judge Jenny Boal, Dean
19 Spencer, Josh Gardner from the DOJ.

20 Ariana Tadler has been our attorney member
21 and our clerk representative. Susan Soong, everybody
22 has done great work on this project to get it to where

1 it is. And, of course, our esteemed reporters -- I
2 can see them both on my screen right now -- Ed Cooper
3 and Rick Marcus, and I know we've gotten help along
4 the way from Emery Lee too. I think Emery's on today
5 as well, so thank you, everybody, for all your work.

6 And, of course, I want to thank everybody
7 for the written comments as well. I know we received
8 a number of written comments from folks who are not
9 going to testify today, but we do appreciate and will
10 certainly take into consideration all of those
11 comments.

12 The plan for today is to hear testimony from
13 two witnesses, and after each witness's testimony, I
14 will ask whether any of the subcommittee members or
15 reporters or any of the committee members has any
16 questions. And to the extent that there are questions
17 or comments, I would appreciate our presenters, if
18 they have any answer they'd like to give, we certainly
19 would welcome that.

20 And then I think, once we finish our two
21 witnesses, that will conclude today's proceeding, and
22 the subcommittee can go back to work and think about

1 everything that they've heard today and also all the
2 written comments that we've received. So are there
3 any questions before we call on our witnesses?

4 And again, just a reminder, if you joined
5 late, if you do have a question or comment, if you can
6 use the "Raise Hands" function, it'll help Brittany
7 and me figure out who would like to be recognized.
8 So, with seeing no raised hands at the moment, I will
9 ask our first witness, who is Stacy Braverman Cloyd,
10 the Director of Policy and Administrative Advocacy for
11 the National Organization of Social Security
12 Claimants' Representatives, if she would please give
13 her testimony today. And, again, we thank you for
14 your remarks.

15 MS. CLOYD: Thank you, and good afternoon,
16 everybody. Thank you for the opportunity for the
17 National Organization of Social Security Claimants'
18 Representatives, or NOSSCR, to comment on these
19 proposed rules.

20 NOSSCR is a specialized bar association, and
21 since 1979, we have served attorneys and non-attorney
22 representatives who represent Social Security

1 Disability Insurance and Supplemental Security Income
2 claimants throughout the adjudicative process all the
3 way through federal court.

4 Many of our members handle cases in federal
5 court, and for some, that is their entire practice.
6 My name is Stacy Cloyd, as mentioned, and I am
7 NOSSCR's Director of Policy and Administrative
8 Advocacy. I've been grateful to the Judicial
9 Conference and to ACUS before that for their openness
10 to our feedback over the years that this question of
11 specialized rules for Social Security cases has been
12 considered.

13 NOSSCR's longstanding position is that
14 national specialized uniform procedural rules for
15 Social Security cases in Federal District Court are
16 not necessary. Social Security cases represent about
17 7 percent of the federal docket, but there's no
18 compelling reason for them to be treated as lesser or
19 different than the other 93 percent of cases, many of
20 which also involve review of agency actions or
21 decisions.

22 NOSSCR members oppose amending the Federal

1 Rules of Civil Procedure in a way that sets Social
2 Security cases apart from other Federal District Court
3 cases. And although NOSSCR members prefer the rules
4 in some districts to others -- for example, joint
5 statements of facts are widely unpopular -- they
6 believe that having different rules in different
7 districts or circuits is no more onerous than having
8 different precedents in those courts.

9 They respect that different judges or courts
10 might have different procedures that help them make
11 prompt and accurate decisions, and they suggest that
12 model local rules and bench-bar dialogues are better
13 ways to create effective rules without the need to
14 amend the Federal Rules of Civil Procedure.

15 So we also don't believe that different
16 local rules reduce access to representation for Social
17 Security claimants. Many of our members practice
18 across multiple states, multiple circuits. We're
19 skeptical, as were several of the Advisory Committee
20 members, that uniform procedural rules would be a
21 panacea or would make a significant difference for
22 SSA's or claimants' attorneys.

1 Certainly, we think there are other ways
2 that SSA could improve efficiency, so, for example,
3 assigning attorneys to specific districts or circuits,
4 improving agency processes for generating the
5 certified administrative record, which I'll note has
6 been the cause of significant delays in thousands of
7 Social Security District Court cases filed nationwide
8 over the past year, and for the agency to improve
9 decisional accuracy at the agency level so that fewer
10 cases need to go to federal court at all.

11 These would all likely have a bigger impact
12 than changing the Federal Rules. And so, although we
13 don't support the concept of issue-specific
14 supplemental rules, we really appreciate the efforts
15 of the Judicial Conference in making several rounds of
16 revisions to this proposal. We think that these
17 changes have increased the rules' clarity and equity.

18 We do still, though, have a few outstanding
19 concerns. In Proposed Rule 2, which is about
20 complaints, we don't think that the last four digits
21 of the claimant's or the number-holder -- the person
22 whose Social Security record is in question in a

1 case -- we don't think that their Social Security
2 Number or the last four digits should be required in
3 the complaint. It's highly personal information, and
4 when combined with people's names and counties of
5 residence, it can create a risk of identity theft.

6 I'll note that NOSSCR members are less
7 concerned about the portion of the Social Security
8 Number in situations where cases are electronically
9 filed and served than in cases where there's paper and
10 mail service. But, in either scenario, the inclusion
11 of the Social Security Number doesn't seem necessary,
12 and that's because SSA is currently moving towards
13 using beneficiary control numbers and other
14 alternative forms of identification on its notices.

15 So one thing that the agency could do is put
16 a beneficiary control number on each Appeals Council
17 denial or other notice where it informs claimants
18 about their right to appeal to federal court. Or they
19 could contact the plaintiff in a District Court case
20 to obtain the Social Security Number in a private way.

21 And as those changes occur within the
22 agency, we think it would be inefficient to have to

1 change the Federal Rules of Civil Procedure to
2 accommodate those future changes. So it would
3 probably be better to simply leave the Social Security
4 Number out of Rule 2 if these rules are finalized.

5 However, we don't think that inclusion of
6 the Social Security Number in the complaint should be
7 forbidden for litigants who choose to do it. And,
8 certainly, I could imagine pro se litigants who put
9 that on their filings just because they believe that
10 it is useful.

11 NOSSCR strongly supports allowing plaintiffs
12 to plead in more detail than the short complaint
13 statement proposed in Rule 2(b)(2). We note that SSA
14 requests voluntary remand of about 15 percent of all
15 District Court cases, and it helps everybody if the
16 Commissioner's aware of all the issues that might
17 affect whether the agency chooses to defend itself or
18 request remand. We know our members will be as brief
19 as possible, but we don't want them to be so brief
20 that they don't communicate to the Commissioner things
21 that might lead the Commissioner to ask for remand.

22 And we suggest that the Committee note about

1 allowing people leave to amend their complaints if
2 they fail to plead any of the required elements be
3 included directly in any finalized rules or in a
4 footnote because we agree with that committee note.
5 It would be easy for someone, especially someone pro
6 se, to leave some of these things out: the title or
7 titles under which the claim is brought, the county of
8 residence, especially for people who live in cities --
9 they may not know the name of the county -- or that
10 relief is sought under § 405(g), and it doesn't make
11 sense to have those cases dismissed for those reasons.

12 Moving on to Rule 3 on service, we just
13 wanted to note that in some districts that have
14 allowed filings sent by the court to suffice for
15 service, our members have reported that there's been a
16 little bit of a challenge that notice to SSA's Office
17 of General Counsel and the U.S. Attorney didn't allow
18 access into the court's e-folder because some clerks
19 took the position that it could send notice of the
20 suit to those folks, but it could not share the
21 content of the filing since no one had yet appeared
22 for the Commissioner, and a change in the standing

1 order was needed.

2 In our written comments, we put in some
3 language from Connecticut's standing order that might
4 be useful in clarifying that the rules don't do away
5 with service but that electronic service is agreeable
6 to the Commissioner, as memorialized by a blanket
7 consent. So, if these are finalized, we just
8 encourage that to be worked out with SSA and with all
9 the clerks.

10 In Proposed Rule 4, we do support a rule
11 that would allow the Commissioner to submit the
12 certified administrative record, sometimes called the
13 transcript, and any affirmative defenses as part of an
14 answer, but we believe that the Commissioner should be
15 required to respond to all the claims and allegations
16 in the complaint as well, and that's because NOSSCR
17 members feel that if this complaint-and-answer
18 process, including Federal Rule of Civil Procedure
19 8(b), is appropriate for other Federal District Court
20 cases, it's also appropriate for Social Security
21 cases. We don't think that Rule 4(b) would allow
22 plaintiffs enough information about SSA's position on

1 issues raised in the complaint to write thorough and
2 concise briefs in response. And we note that the
3 Commissioner has mechanisms like general denials to
4 simplify the answer-writing process.

5 We do support the idea that motions for
6 voluntary remand should be permitted at any time
7 during a case, but we think that the transcript should
8 be filed with those motions if it hasn't been filed
9 already, with the exception of situations where the
10 Commissioner is requesting remand because the
11 transcript can't be located.

12 And this rule, along with a requirement that
13 the Commissioner provide notice before filing a motion
14 for voluntary remands will ensure that plaintiffs can
15 make informed choices about whether to consent to
16 those voluntary remands and allow them to work out the
17 details of those voluntary remands with Social
18 Security's lawyers so that it can be presented in a
19 way that is consented to by both sides and then sent
20 on to the judge.

21 And then, for Proposed Rules 6, 7, and 8,
22 NOSCCR's commented in the past that if there are going

1 to be supplemental rules with deadlines for the
2 submission of the motion for relief, defendant's
3 response brief, and then plaintiff's reply brief,
4 those deadlines, we would prefer 60, 60, and 21 days,
5 respectively.

6 And that's especially true if Rule 4 gets
7 finalized in a way that no longer requires the
8 Commissioner's answer to respond to claims and
9 allegations asserted against in the plaintiff's
10 complaint because, in that scenario, plaintiffs are
11 going to need to use their briefs to anticipate how
12 the Commissioner could respond and then use the reply
13 brief to address how the Commissioner actually does
14 respond. And since the vast majority of these cases
15 are resolved on the briefs, giving litigants enough
16 time to prepare them will provide the judges with
17 better information on which to rule, and it might
18 reduce requests for extensions.

19 So, in conclusion, we believe that the
20 current Federal Rules of Civil Procedure, combined
21 with the local rules, are effective, and that it's not
22 necessary to have special rules for Social Security

1 cases. But if subject-specific rules are added to the
2 Federal Rules, we hope that our comments help the
3 Judicial Conference provide Social Security litigants
4 the same balance between efficiency and accuracy and
5 between parties as any other cases adjudicated in
6 federal courts.

7 So thank you again for the opportunity to
8 testify on these proposed rules, and I'd be glad to
9 answer any questions at this time.

10 JUDGE DOW: Well, thank you very, very much
11 for your thoughtful comments. And we also appreciate
12 you supplying those in written form too.

13 Are there any questions for Ms. Cloyd? And
14 if so, if you'd use that little "Raise Hands" feature,
15 we'll recognize each person. Okay, Professor Marcus?

16 PROF. MARCUS: Can you hear me first?
17 Great. I've got, I think, a series of little picky
18 questions. Number one, regarding the proposal that
19 the administrative record suffice as an answer, our
20 current Rule 8(b) says that there's no such thing as a
21 general denial unless you deny everything, even the
22 statement of jurisdiction. And I'm wondering how you

1 would think that would fit together?

2 And also, if you could tell us -- this is
3 all related, I think, to the question of responding to
4 whatever is in the complaint -- is it wrong to say
5 that sometimes these are pro se documents with a whole
6 lot of assertions in them? And so wouldn't there be a
7 concern that failure to deny might be regarded as an
8 omission? That's question one.

9 Question two, on timing, I note that the
10 other witness is from the Rocket Docket, the Eastern
11 District of Virginia. I wonder how long do you find
12 in general, do your members find that it actually
13 presently takes to process these cases? One of the
14 comments we received from a lawyer who handles these
15 is that he's never received the administrative record
16 within 60 days, which is what the rule calls for.

17 And third, just a detail question because a
18 comment we received said that the proposal overlooks
19 our Rule 5.2(a)(3), which has to do with using only
20 initials for a minor. How often are the claimants
21 minors? So question one about what's in pro se
22 pleadings, question two about duration of cases now --

1 thinking the Rocket Docket probably moves things along
2 fast -- we'll hear about that later. And then
3 question three about, are the claimants often a minor?
4 Just because that has been raised in a comment we
5 received. So thank you very much, and I'm curious to
6 hear what you have to say about these things I'm
7 asking about, just little picky points.

8 MS. CLOYD: So I think I'll actually take
9 those in reverse order if that's okay because I think
10 the last question was the simplest. It is not
11 uncommon for there to be a child as a party in these
12 cases. Children can receive SSI benefits if they are
13 disabled and low-income. Children can also receive
14 benefits on a parent's record in various situations,
15 whether that is survivor benefits or if their parent
16 is disabled or deceased or elderly. So I would not
17 say that it is the majority of cases, but it's
18 certainly not unusual to have a minor as a plaintiff
19 in these cases.

20 And I'll note that there was, I believe, a
21 recommendation, not a requirement, for cases more
22 broadly, and some courts have adopted it where the

1 case caption even for adults is first name and then
2 the last initial of the last name. So, for example,
3 I'd be Stacy C. versus Commissioner, or Commissioner
4 Saul. And so I think that is a useful point that
5 sometimes minors are litigants in these types of
6 cases.

7 Next, working backwards, is the question of
8 timing. I think it varies a fair amount how long it
9 takes to get the certified administrative record in
10 these cases, but I agree that it often goes above 60
11 days, and, certainly, since the pandemic, that has
12 been a huge problem.

13 I will say I did not get a lot of complaints
14 from NOSSCR members about this beforehand. Maybe they
15 were just used to how long it took, but since the
16 pandemic, it has really stretched out, and we are
17 hearing about SSA requesting oftentimes third and
18 fourth extensions.

19 That gets to a point where, although our
20 members, of course, want to be congenial, they also
21 need to balance that with their client's great need.
22 And so I do think that's a challenge. And I can't

1 speak for SSA. When I've talked with them, it seems
2 like they've been trying to make some steps towards
3 improving that, but from what I hear from NOSSCR
4 members, they are not where they need to be at all as
5 an agency on getting those transcripts in in a timely
6 fashion, and that really creates a roadblock to doing
7 anything else in a case.

8 And then, to the last question, which was
9 your first question about general denials, I think
10 there are various ways that could be done. One
11 possibility is to write a supplemental rule that says
12 that filing the transcript is deemed a general denial
13 to all allegations except those specifically admitted
14 and a waiver of all affirmative defenses.

15 That is certainly one way that it could
16 happen. And we think that, overall, in terms of pro
17 se litigants, who make up a small but, I think,
18 meaningful percentage of litigants in Social Security
19 cases, I would agree it could be a challenge depending
20 on what they assert, and, certainly, I would imagine
21 they have non-standard forms of pleading many times.

22 I think that responding to those is not

1 going to be a significant amount of work in contrast
2 with the overall workload that SSA has to manage. I
3 mean, at this point, they're getting about 2,000
4 District Court case filings a month. So it's
5 significant, but the ones where there is a pro se
6 claimant who has pled a lot of different things in a
7 complaint would make up a pretty small percentage of
8 those, and I'm not sure that we need to design a whole
9 supplemental rule around those rare cases.

10 JUDGE DOW: Thank you. Were there any other
11 questions? I see Professor Cooper.

12 PROF. COOPER: Ms. Cloyd, can you tell us
13 anything more about the Beneficiary Control Numbers?
14 Does SSA have one for every proceeding? Sometimes?
15 Are they developing it further?

16 MS. CLOYD: I can tell you what I know about
17 it, which is that this comes from legislation that was
18 passed in Congress that was designed to reduce the
19 situations where the government mails out somebody's
20 Social Security Number on a notice or a document.

21 And so SSA obviously uses that Social
22 Security Number as an identifier, but because it's

1 been used by banks and credit card companies, it's
2 become more sensitive information than it otherwise
3 probably would have been. And so SSA is making
4 progress on this, but they are not fully there on
5 putting Beneficiary Control Numbers on the various
6 notices that are sent out.

7 I learned about this when we had a loss in
8 our family, and I saw the notice that was sent out
9 with a BCN, a Beneficiary Control Number, rather than
10 the deceased person's Social Security Number. And I
11 think it is a good strategy that SSA is implementing.

12 I don't know that they're there yet with it. My
13 understanding is that when, for example, the Appeals
14 Council is sending out notices, I do think that they
15 often still do have the claimant's Social Security
16 Number on them. But that may very well change in the
17 future.

18 And so, in an effort to make sure that the
19 Federal Rules of Civil Procedure are not modified in a
20 way that starts to look dated and then requires
21 another change in the future, I think it might make
22 sense to leave off the requirement of the last four

1 digits of the Social Security Number because I think
2 that SSA very easily could start putting Beneficiary
3 Control Numbers on anything where they're also putting
4 information about the claimant's right to file a
5 federal court case. It's probably better for privacy,
6 and it would make sense for the federal court rules
7 not to be locked into something that may look dated
8 relatively soon.

9 PROF. COOPER: It sounds as if they are
10 using it at the stage of sending notice and not for
11 internal tracking as a proceeding goes from the
12 beginning, to the Administrative Law Judge, to the
13 Appeals Council?

14 MS. CLOYD: That's my understanding, and,
15 certainly, I am coming to this as an outsider to SSA,
16 and they may be able to provide more information. But
17 my sense is that the Beneficiary Control Number you
18 receive on one notice is not the same as what you
19 might receive on a subsequent notice, even if you are
20 the same person or you're dealing with the same
21 matter.

22 They do have some sort of way of knowing

1 when they're told a Beneficiary Control Number who it
2 refers to. They can match that up internally because,
3 otherwise, the number wouldn't be very useful. But I
4 don't think that it's necessarily a single number that
5 traces from the initial application through the ALJ
6 hearing and the Appeals Council and then onto federal
7 court.

8 But, if there were something, for example,
9 on Appeals Council denials anytime that somebody was
10 told you have the right to file in Federal District
11 Court that said please use this Beneficiary Control
12 Number, presumably, then OGC or the U.S. Attorneys
13 would be able to match that up when they saw that
14 number on a federal court filing. But it wouldn't be
15 a number that was of any value to an identify thief.

16 MR. COOPER: Right, thank you.

17 JUDGE DOW: Any further questions?
18 Professor Spencer?

19 DEAN SPENCER: Can you hear me?

20 JUDGE DOW: Yes.

21 DEAN SPENCER: Can you just give me your
22 bottom-line overall objection? Do you think that

1 these rules would make it more difficult for claimants
2 to prevail, or is it going to make it more expensive
3 for them to -- and time-consuming for them to
4 litigate? Or what's the bottom-line impact, adverse
5 impact, for the claimant that you anticipate?

6 MS. CLOYD: So I'll first note that these
7 rules are a lot better than previous drafts of them in
8 terms of their equity between the plaintiff and the
9 defendant, so I really appreciate that.

10 I do think that the rules about the
11 transcript serving as the answer could make these
12 cases harder to litigate. It will make it harder to
13 write briefs when you don't have that much information
14 from the answer. So I do think that that is a
15 concern. But I think that NOSSCR's concern is broader
16 than that and would exist even regardless of what were
17 in the specialized rules, that we don't want these
18 cases treated differently or lesser than other cases.

19 We know that there are judges and clerks who
20 don't particularly like doing Social Security cases
21 for a variety of reasons, and there are probably
22 judges who don't like doing other cases for other

1 reasons. But we don't think that there's a need for
2 specialized rules. These cases are more like other
3 Federal District Court cases than they are different.

4 There are lots of cases that review agency
5 actions or decisions or that are sort of, I would say,
6 appellate-ish in their posture because they are
7 reviewing something that perhaps an Administrative Law
8 Judge or another decision-maker outside of the federal
9 courts already did.

10 And so we just don't want these cases
11 treated differently. And we know that there are
12 concerns from a broader sector of, I'd say, the legal
13 industry about specialized rules in general and that
14 this may lead to requests for specialized rules from
15 other agencies or other groups of litigants. Because
16 NOSCCR members, you know -- NOSCCR focuses on Social
17 Security, that's less of our concern, but we respect
18 the other groups that have that concern.

19 JUDGE DOW: Thank you. Were there any
20 further questions for Ms. Cloyd? Judge Boal?

21 JUDGE BOAL: Yes, if you could just follow
22 up on your last comment that you felt that if the

1 transcript served as an answer it would be harder to
2 litigate. My understanding -- and I'm not obviously
3 as experienced as you in Social Security litigation --
4 is that the case is essentially an appeal from the
5 last decision of the agency. So perhaps you could
6 give me an example of how the transcript serving as an
7 answer would make the case harder to litigate?

8 MS. CLOYD: So there may be situations where
9 the response that somebody gives to a pleading in the
10 complaint is useful. So, for example, if -- and this
11 is probably a fairly rare example, but, for example,
12 if one of the things in the pleading is that there
13 were documents that were not included in the certified
14 administrative record, it would be useful to know what
15 the Commissioner thinks about that argument.

16 Similarly, if there are factual things that
17 are in the complaint -- where the claimant lives, how
18 old the claimant is, which age is a very important
19 factor in many Social Security cases and sometimes
20 ALJs get it wrong, they're wrong about how old the
21 claimant is -- it's useful to know what the
22 Commissioner thinks about those arguments so that when

1 the plaintiff is writing a brief, they don't have to
2 anticipate what the Commissioner might say in the
3 response, but they already know from the complaint
4 what the Commissioner's position is on these topics.

5 So I think that it could be useful in many
6 cases to have this. In some cases, it's not going to
7 be very difficult for SSA to respond to what's in the
8 complaint. In some, it may be a more intensive
9 process, but it's a process that we think is useful
10 and should come as early in litigation as possible
11 rather than waiting until after the plaintiff's brief
12 is filed.

13 JUDGE DOW: Thank you. Any further
14 questions from any of the members of the Committee?

15 (No response.)

16 JUDGE DOW: Okay, thank you so very much,
17 Ms. Cloyd, for your testimony and for your answering
18 our questions as well. We really appreciate it.

19 MS. CLOYD: Thank you so much.

20 JUDGE DOW: Okay. Our second witness for
21 today is Joanna Suyes. I hope I said that right. Did
22 I pronounce your name right?

1 MS. SUYES: Suyes. Thank you, though.

2 JUDGE DOW: Suyes, okay. Very good. And
3 Ms. Suyes is a Social Security Disability lawyer, as
4 Professor Marcus adverted, in the Rocket Docket. She
5 practices in Richmond at Marks & Harrison. She's also
6 the Chair of the AAJ Social Security Disability
7 section and a sustaining member of NOSSCR. So, again,
8 good afternoon. Thank you for being with us today,
9 and thank you for your remarks.

10 MS. SUYES: Good afternoon. Thank you,
11 Judge Dow, and thanks to the Advisory Committee for
12 allowing me to have the opportunity today to testify
13 about proposed Social Security rules. I understand
14 it's a different situation to hold this meeting
15 virtually, especially since we're all tired of those,
16 I'm sure. So I do appreciate your time and your
17 thoughtful attention to my testimony.

18 As was said, I am Joanna Suyes, and I am a
19 Principal Attorney at Marks & Harrison Law Firm in
20 Richmond, Virginia. I've handled Social Security
21 claims now for about 12 years. It is my sole
22 practice. I also chair the Social Security Disability

1 Law section of AAJ, and I'm a Sustaining Member of
2 NOSSCR, and Vice President of the Virginia Trial
3 Lawyers Association and a member of its Social
4 Security section. And my experience with the federal
5 court system has been almost exclusively in the
6 Eastern District of Virginia.

7 I will start by saying that although I'm
8 testifying on my own behalf, AAJ does share the
9 concerns raised by Ms. Cloyd and NOSSCR, and so I'd
10 like to highlight a few things in particular. I
11 understand the jurisdiction of this body does not
12 allow it to make rules for the Social Security
13 Administration. But, if one of the goals is to
14 decrease the number of Social Security cases filed in
15 federal court and to lighten the load on federal
16 judges and attorneys, then I respectfully submit that
17 these rules do not solve that problem.

18 When an Administrative Law Judge issues an
19 unfavorable decision, claimants must exhaust their
20 administrative remedies by filing an appeal first with
21 the Appeals Council. It is my understanding that in
22 fiscal year 2020, just under 16 percent of cases on

1 which a claimant requested review by the Appeals
2 Council were granted review by the Appeals Council,
3 the vast majority of which were remanded for further
4 adjudication.

5 On the other hand, federal courts remanded
6 new Social Security cases at a rate of almost 50
7 percent in 2020. The Appeals Council also conducts
8 own motion reviews of cases not appealed by the
9 claimant. However, last year, the Appeals Council
10 conducted own motion review only of favorable
11 decisions.

12 Including unfavorable decisions in own
13 motion reviews and conducting better reviews of ALJ
14 decisions at the administrative level would almost
15 certainly lighten the load on federal courts, and the
16 Appeals Council should weed more of these cases out.
17 Any strain on federal courts caused by Social Security
18 filings should be addressed at the Appeals Council
19 level first. Creating new federal rules is unlikely
20 to alleviate these problems.

21 The proposed rules also do not solve the
22 problem of Social Security Administration attorneys

1 having to adjust to multiple different local rules
2 because local rules would still be allowed.

3 Currently, the Richmond Division of the Eastern
4 District of Virginia operates under three different
5 standing orders for Social Security matters.

6 Furthermore, if we continue to create
7 supplemental rules for specialized practice areas, the
8 problem isn't solved. It only changes from one of
9 different rules for different localities to one of
10 different rules for different practices in substantive
11 areas of law.

12 Many of my colleagues have expressed concern
13 about the deadline and timing changes of these
14 proposed rules, but, as has been noted, I practice on
15 the Rocket Docket, and so I have to confess that the
16 proposed rules do not alter the timing for plaintiffs
17 and scheduling orders currently entered by judges in
18 the Eastern District of Virginia.

19 But they do alter the timing for AUSAs.
20 Under these proposed rules, Social Security attorneys
21 in the Eastern District now will have to file their
22 opposition briefs within 30 days of receiving my

1 motion for summary judgment, as opposed to the 60 days
2 allowed here now. And while plaintiffs' attorneys do
3 have a slight timing advantage, frankly, 30 days is
4 not enough time for either side to prepare an adequate
5 brief after receiving a certified administrative
6 record which sometimes runs into the thousands of
7 pages.

8 Requests for extensions of time are routine
9 now and will only become worse. I urge you to adopt a
10 60-day deadline for the exchange of briefs for both
11 sides. Furthermore, if the goal is for rules to lead
12 to more focused appeals, adopting page limits for
13 briefs is more likely to accomplish this as it would
14 lead to less work by AUSAs and judges.

15 I also would like to emphasize a point made
16 by NOSCCR and AAJ. Using the last four digits of a
17 person's Social Security Number is dangerous and
18 should be eliminated from this rulemaking. The most
19 personal part of the SSN is the last four digits. In
20 the Eastern District of Virginia, complaints are now
21 filed electronically, meaning they appear in PACER,
22 and free access to PACER, which could become a

1 reality, means free access by hackers or other bad
2 actors to highly sensitive biographical information
3 filed with Social Security cases.

4 As Ms. Cloyd mentioned, safer alternatives
5 exist. Here, in the Eastern District, if the Social
6 Security Number is not provided by the plaintiff at
7 the time of service of the complaint, the AUSA simply
8 calls me to get the Social Security Number. A better
9 time-saving solution, however, might be one that SSA
10 is already beginning to implement, which is use of the
11 Beneficiary Control Number.

12 I would estimate, though I haven't done a
13 complete survey, that I see a Beneficiary Control
14 Number on probably 25 to 30 percent of the
15 correspondence I get from the Social Security
16 Administration right now. The SSA appears to be
17 phasing out use of Social Security Numbers to identify
18 claimants once a claim has been filed, and requiring
19 use of the last four digits of a Social Security
20 Number in the federal court system formalizes a
21 process from which the Social Security Administration
22 itself appears to be moving away.

1 In sum, the proposed rules appear to be an
2 effort to streamline the appeals process and lighten
3 the load on the federal court system, but rulemaking
4 within the Social Security Administration itself would
5 more effectively achieve those goals. So I thank you
6 again for giving me the opportunity to testify, and
7 I'm happy to try to answer any questions that you
8 might have.

9 JUDGE DOW: Thank you, Ms. Suyes, thank you
10 so much. Professor Marcus?

11 PROF. MARCUS: One quick question. In the
12 written submission we got a couple of days ago from
13 you, you mentioned useful aspects of the proposed
14 rules, and I wonder if you could say something about
15 what are the useful aspects and whether the things you
16 don't like are more important than those things that,
17 I assume, don't exist unless we go forward with
18 something like this proposal.

19 MS. SUYES: Yes sir. The useful aspects of
20 the proposed rules are, well, at least for me
21 personally, that nothing is changing timing-wise for
22 me. I currently have a 30-day deadline for filing a

1 brief and the 14-day response time on a reply brief.
2 That is certainly useful. I do believe that
3 streamlining the process certainly does help, and the
4 rules are clearly written. And that is all -- that's
5 going to be very helpful, especially for pro se
6 litigants.

7 So those are definitely some of the things
8 that we believe are useful. The bracketed language on
9 service, we also support the language found in Rule 3
10 related to the importance of providing notice to the
11 plaintiff of transmission of the complaint. So we do
12 support that language if this is implemented.

13 I share the concerns of Ms. Cloyd that
14 establishing rules for this particular area of
15 practice might be somewhat of a slippery slope to
16 other areas of practice. I limit my practice to
17 Social Security disability cases, but others in my
18 firm do practice other areas of law in federal court,
19 and there is some concern that the creep might
20 continue to mean that suddenly there are separate
21 rules for Fair Labor Standards Act cases or other
22 types of employment litigation or personal injury

1 litigation that happens in federal court. So we are
2 concerned about that, yes.

3 JUDGE DOW: Okay. Other questions for Ms.
4 Suyes?

5 (No response.)

6 JUDGE DOW: Okay. Well, thank you very,
7 very much for your participation and your testimony
8 today. I'm very grateful to both witnesses and also
9 to all our written commenters. If there are no
10 further questions, I guess that will conclude today's
11 proceeding. I thank you all for participating and
12 look forward to our rules meeting in April, where
13 we'll take up some more of this subject. So thank
14 you, everybody, and have a good weekend.

15 (Whereupon, at 1:42 p.m., the judicial
16 conference in the above-entitled matter adjourned.)

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CERTIFICATE

DOCKET NO.: N/A

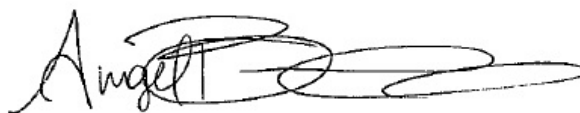
CASE TITLE: Public Hearing on Proposed Amendments
to the Federal Rules of Civil
Procedure

HEARING DATE: January 22, 2021

LOCATION: Washington, D.C.

I hereby certify that the proceedings and
evidence are contained fully and accurately on the
tapes and notes reported by me at the hearing in the
above case before the Administrative Office of the
U.S. Courts.

Date: January 22, 2021

A handwritten signature in black ink, appearing to read "Angela Brown", with a large, stylized flourish extending to the right.

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